

D.P.U./D.T.E. 96-100

Investigation by the Department of Telecommunications and Energy upon its own motion commencing a Notice of Inquiry/Rulemaking, pursuant to 220 C.M.R. §§ 2.00 et seq., establishing the procedures to be followed in electric industry restructuring by electric companies subject to G.L. c. 164.

ORDER ADOPTING EMERGENCY REGULATIONS

I. INTRODUCTION

By this Order, and pursuant to G.L. c. 30A, § 2, the Department of Telecommunications and Energy (Department") adopts emergency regulations with respect to the licensing of competitive suppliers and electricity brokers. These emergency regulations are necessary for the public safety and general welfare and to implement the intent and will of the Legislature manifest in the Electric Industry Restructuring Act, Chapter 164 of the Acts of 1997 (the "Act").¹ The Act, itself an emergency law, set forth actions that must be taken to meet the statutorily prescribed retail access date of March 1, 1998. The need to allow new entrants to the electricity market a reasonable period to apply for and receive licenses before March 1, 1998 necessitates recourse to G.L. c. 30A, § 2 authority. A final Order must be issued within 90 days after an opportunity for comment pursuant to G.L. c. 30A, § 2. The emergency regulations are designated as 220 C.M.R. § 11.00, and are effective upon filing with the Secretary of State of the Commonwealth. A copy of the regulations is this day submitted to the General Court.

II. HISTORY OF THE PROCEEDING

On August 16, 1995, the Department issued our Order in Electric Industry Restructuring, D.P.U. 95-30, setting forth principles for a restructured electric industry and for the transition to a restructured electric industry. On March 15, 1996, the Department issued an Order commencing a Notice of Inquiry ("NOI")/Rulemaking to develop rules and regulations that would implement the principles established in D.P.U. 95-30. The scope of the NOI/Rulemaking covered developing a competitive electric generation market, including requirements for competitive suppliers. Order

¹ An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced Consumer Protections Therein. St. 1997, c. 164.

Commencing Notice of Inquiry ("NOI")/Rulemaking and Setting a Procedural Schedule, D.P.U. 96-100, at 5-6 (March 15, 1996). After notice and an opportunity for public comment, on May 1, 1996, the Department issued proposed rules accompanied by a detailed explanatory statement. Draft Rules and Explanatory Statement, D.P.U. 96-100 (May 1, 1996). Thereafter, the Department received two rounds of comments and conducted fifteen days of hearings on issues raised by the Department's draft rules. In addition, the Department held sixteen public hearings around the Commonwealth.

On December 30, 1996, the Department concluded the first phase of our rulemaking proceeding by issuing Electric Industry Restructuring: Model Rules and Legislative Proposal, D.P.U. 96-100 (1996). The Model Rules were to govern the transition and to apply thereafter to the restructured electric industry. The Model Rules provided a regulatory framework for an efficient industry structure that would minimize long-term costs to consumers while maintaining the safety and reliability of electric services with minimum impact on the environment. Among other things, the Model Rules governed supplier requirements such as licensing.

The Department delayed promulgation of final rules in deference to the Legislature, under whose delegation the Department acts. During 1997, the Legislature undertook a comprehensive review of electric restructuring, culminating in passage of the Act in late November. The Department's Order in D.P.U. 96-100 anticipated that the Legislature might enact different principles, in which case the Department would modify the final rules consistent with Legislative direction. Id. at 23.

As anticipated, the Act requires the Department to implement our principles by

promulgating rules and regulations on many of the same issues the Department included in our Model Rules. Among other things, the Act requires the Department to promulgate rules and regulations for licensing of all entities that propose to compete in the market. St. 1997, c. 164, § 193, (G.L. c. 164, §§ 1F(1), 1F(6), 1G(d)(2)). By this Order, the Department promulgates these rules and regulations. As noted earlier, the need to move with dispatch to establish an orderly market for newly licensed entrants necessitates resort to the emergency regulation provision of the Administrative Procedure Act, so that businesses are to be positioned for the retail access date. G.L. c. 30A, § 2. Before these rules can become permanent, however, further action will be required, including an opportunity for public comment. Id. A later Department Order will provide for that opportunity.

III. ANALYSIS

The Act establishes a comprehensive framework for the restructuring of the electric industry, within which competitive suppliers will supply electric power and customers will gain the ability to choose their electric power supplier. The Act provides retail customers with increased consumer protections as participants in the restructured competitive market and directs the Department to promulgate rules and regulations that effect those protections. Specifically, the Act requires the Department to license all generation companies, aggregators, suppliers, power marketers and brokers to do business in the Commonwealth. St. 1997, c. 164, § 193, (G.L. c. 164, § 1F(1)). The Department is also required to maintain a list of all licensed suppliers. Id. To enhance consumer protection and to enable customers to make informed choices, the Act requires that the Department promulgate rules and regulations regarding the information that suppliers

must disclose to potential customers. Id. at § 193, (G.L. c. 164, § 1F(6)). As a condition of licensure, the Act requires suppliers to follow uniform labeling regulations issued by the Department. Id. The Department's licensing regulations require applicants to declare that they will comply with the information disclosure regulations that the Department will promulgate.

The Department's licensing regulations apply to all applicants, whether competitive suppliers or electricity brokers. The distinction between competitive suppliers and electricity brokers lies in whether the entity takes title to electricity, a concept long-accepted in Massachusetts law. See G.E. Lothrop Theatres Co. v. Edison Electric Illuminating Company of Boston, 290 Mass. 189, at 193-94 (1935) (recognizing the concept of title to electricity). The term "Competitive Supplier" encompasses any entity, including, but not limited to, a generation company or aggregator that produces, purchases, or otherwise takes title to power and sells it to retail customers. The term "Electricity Broker" encompasses any entity, including, but not limited to, an aggregator that groups together electricity customers to facilitate the purchase and sale of generation service, but who does not produce, purchase, or otherwise take title to the power sold. The licensing regulations require all competitive suppliers and electricity brokers to file with the Department, for review and approval, certain identifying information including, among other things: (1) legal name; (2) business address; (3) a statement and documentation of legal organization; and (4) telephone numbers and identity of officers, directors, partners and contact persons. Competitive suppliers and electricity brokers must provide the Department with a brief description of the nature of the business being conducted and documentation of financial capability to conduct that business. The applicant must also provide evidence that any above-

market purchased power contract between the applicant, its affiliates, parent or subsidiary and an electric company formed pursuant to G.L. c. 164, is the subject of renegotiation. In addition, each applicant must provide documentation of technical ability to generate or otherwise obtain and deliver electricity, or provide other proposed services. A competitive supplier may document its technical ability and financial capability by providing the Department with evidence that the competitive supplier is a New England Power Pool (“NEPOOL”) participant or will meet its transaction requirements through a contractual arrangement with a NEPOOL participant.

The Act mandates that the benefits of competition be available, through retail choice of electric power suppliers, to all consumers on March 1, 1998. The Department is reviewing the investor-owned electric utilities’ restructuring plans, designed to accommodate retail access to generation services and choice of suppliers by retail customers. In addition, the Department has compiled a list of approximately thirty-five suppliers who have pre-registered with the Department. In order to accommodate choice of suppliers, it is necessary that there be suppliers licensed to do business in the Commonwealth as required by the Act. Given the nature of a licensing process, particularly the time and resources the Department requires to review filings, and the business needs of suppliers to comply with such a process, the Department must adopt regulations for licensing of suppliers well before the March 1, 1998 retail access date set in the Act.²

² On July 23, 1997, the Department issued a letter announcing that the Department had commenced pre-registration of competitive suppliers. The purpose of pre-registration was informational, given that final regulations had not yet been promulgated. A copy of this Order will be mailed to all pre-registered entities in the interest of expediting licensure as far in advance of the March 1, 1998 retail access date.

Thus, the Department promulgates the regulations governing supplier licensing as emergency regulations to become effective immediately. The Department's authority to adopt emergency regulations is clear. The Department's regulations provide that upon a finding that "the immediate adoption of a regulation is necessary for the public health, safety or general welfare, and that observance of requirements of notice and public hearing would be contrary to the public interest," the Department may dispense with such requirements and adopt emergency regulations. 220 C.M.R. § 2.05(4); see also G.L. c. 30A, § 2. That the Legislature views immediate and expeditious implementation of the Act as necessary for the preservation of the public convenience is manifest in the Act's emergency preamble and in its findings and declarations. St. 1997, c. 164, Preamble and § 1. The Department finds that rules and regulations governing supplier licensing are necessary to promote efficient competition and consumer choice and hence are necessary for the general welfare. The Department further finds that delay of implementation of these regulations caused by the requirements of notice and public comment would not be in the public interest: delay would severely hamper our ability to satisfy other critical mandates by March 1, 1998.

Accordingly, the Department adopts as emergency regulations 220 C.M.R. § 11.00, entitled Licensing Requirements for Competitive Suppliers and Electricity Brokers. These regulations become effective upon filing with the Secretary of State of the Commonwealth and will remain in effect for a period not to exceed 90 days. However, the Department intends to make the licensing regulations final as part of our comprehensive rulemaking proceeding in D.P.U. 96-100. As final regulations, the licensing regulations will later be renumbered, but

included in the Department's final regulations at 220 C.M.R. § 11.00 et seq. The Department will shortly issue a notice soliciting comments on the licensing regulations and setting forth a deadline of January 30, 1998. However, the Department emphasizes our twin objectives: to provide information to consumers and to provide a degree of business certainty to newly licensed entrants at the earliest practicable date.

Entities seeking a license to do business in the Commonwealth pursuant to these emergency regulations may obtain an application form from the Department by contacting the Registrar at (617) 305-3762. In addition, a copy of the application may be found on the Department's home page: <http://www.magnet.state.ma.us/dpu/>.

IV. ORDER

Accordingly, it is

ORDERED: That the regulations attached hereto and designated as 220 C.M.R. § 11.00 are reasonably necessary for the general welfare and the administration of St. 1997, c. 164, within the meaning of G.L. c. 30A, § 2; and it is

FURTHER ORDERED: That the regulations entitled “Licensing Requirements for Competitive Suppliers and Electricity Brokers” attached hereto are hereby ADOPTED; and it is

FURTHER ORDERED: That these regulations shall take effect upon filing with the Secretary of State of the Commonwealth; and it is

FURTHER ORDERED: That certified copies of this Order and the appended regulations be transmitted by the Secretary of the Department to the Joint Committee on Government Regulations of the General Court.

By Order of the Department,

Janet Gail Besser, Acting Chair

John D. Patrone, Commissioner

James Connelly, Commissioner